No. 153

Supreme Court of the United States

OCTOBER TERM, 1950.

CITIES SERVICE GAS COMPANY, a corporation,
Appellant,

VERSUS

PEERLESS OIL AND GAS COMPANY, a corporation; CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; STATE OF OKLAHOMA EX REL THE COMMISSIONERS OF THE LAND OFFICE, TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION; AND PHILLIPS PETROLEUM COMPANY, a corporation,
Appellees.

APPELLEES' BRIEF

DAVID A. RICHARDSON,
1133 First National Building,
Oklahoma City, Oklahoma,
Attorney for Peerless Oil and Gas Company;
MAC Q. WILLIAMSON,
Attorney General of Oklahoma,
State Capitol Building,
Oklahoma City, Oklahoma;
FRED HANSEN,
Assistant Attorney General of Oklahoma,
State Capitol Building,
Oklahoma City, Oklahoma;
FLOYD GREEN,
Attorney for the Corporation Commission,
State Capitol Office Building,
Oklahoma City, Oklahoma;
THOMAS J. LEE and
RICHARD H. DUNN,
Attorneys for Commissioners of the Land Office,
State Capitol Building,
Oklahoma City, Oklahoma;
and
T. MURRAY ROBINSON,
Hightower Building,
Oklahoma City, Oklahoma,
Attorneys for the State of Oklahoma.

Of Counsel:
RICHARDSON, SHARTEL & COCHRAN
October, 1950.

UTTERBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY, OKLA., PH. 3-8780

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No. 153

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October Term, 1950.

Cities Service Gas Company, a corporation,
Appellant,

versus

Peerless Oil and Gas Company, a corporation; Corporation Commission of the State of Oklahoma; State of Oklahoma ex rel the Commissioners of the Land Office, Texas County Land and Royalty Owners Association; and Phillips Petroleum Company, a corporation,
Appellees.

APPELLEES' BRIEF

Herein, Peerless Oil and Gas Company will be called "Peerless"; Cities Service Gas Company will be called "Cities"; the Corporation Commission of Oklahoma will be called "the Commission"; and the Guymon-Hugoton Gas field will be called the "Hugoton field" or "the field".

Figures in parentheses denote pages of the printed record. All italics are ours.

STATEMENT OF THE CASE

This appeal questions the constitutional validity of two orders of the Commission numbered 19514 and 19515, both made in the same proceeding on December 9, 1946,

and of the statutes of the State construed by its Supreme Court to authorize the orders.

Order No. 19515 is against Cities by name, and requires it to take natural gas ratably from Peerless' wells in the Hugoton field, and to pay therefor not less than 7 cents per MCF at the well measured at a pressure of 14.65 lbs. per square inch. That order also provides that no gas shall be taken from that field at a price less than 7 cents per MCF at a pressure of 14.65 lbs.

Order No. 19514 is general, that is, is not directed to any company by name, but is intended to have general application to all purchasers of gas in the field, and it provides that no gas shall be taken therefrom at a price less than 7 cents per MCF at a pressure of 14.65 lbs.

In accordance with Sec. 18, Art. IX of Oklahoma's Constitution, personal notice of the proceeding was served upon Cities against which by name the proceeding was instituted, and publication of notice to all persons interested but not named was made as a basis for the general order.

The Applications

The application (31) was filed by Peerless on October 12, 1945. It alleged in substance:

Cities is a Delaware corporation having a permit to do business in Oklahoma. Peerless owns an oil and gas lease in the Hugoton field on which it has completed and equipped two producing wells. Cities is engaged in producing gas in that field from the same common source of

supply, and is taking gas therefrom for purposes other than the development of a gas or oil field, operating an oil well, or for its own domestic use. It is also engaged in the transportation of gas from the common source for compensation, hire and otherwise, is a common purchaser thereof under the laws of Oklahoma, and is draining and appropriating the gas from Peerless' lease. Cities is the owner of a pipe line near Peerless' lease and is engaged in the purchase, transportation and sale of gas from the same common source of supply, but is not taking gas from Peerless' wells ratably with its own wells and other wells from which it is taking gas, thereby taking an unfair proportion of the gas from the common reservoir.

Production in the Hugoton field is in excess of market demand, and by the drainage of its lease Peerless is suffering irreparable loss and damage.

On May 7, 1945, Peerless informed Cities in writing of the completion and equipment of its well, and tendered it the gas to be produced therefrom, and offered to sell and deliver the same to it in accordance with the statutes of the State and the orders of the Commission at the price of 6¢ per MCF, or, upon failure to agree on a price, then at such price as might be fixed by the Commission. It offered to do all things and bear all expense required of it by the statutes of the State and the orders of the Commission, and demanded that Cities take gas from the well ratably, as, under the laws of the State and the orders of the Commission, it was its duty to do.

Cities indicated its willingness to take the gas ratably, but refused to pay the price demanded and a dispute arose

as to the price, by reason whereof the Commission has authority to fix the price, and also should fix the price to be paid for gas throughout that field by all purchasers. Ten cents per MCF measured at atmospheric pressure is a reasonable price, and would prevent the waste of gas in the field, conserve the same, and prevent its use for inferior purposes.

Cities' practice of measuring gas at 2 lbs. above atmospheric pressure results in a loss to the producers and royalty owners of more than 10 per cent of the gas purchased from them, and a corresponding loss to the State in gross production taxes, and to the Commissioners of the Land Office in royalties derived from the State's school lands.

It prayed that the Commission order Cities to connect with Peerless' well at some point designated by the Commission, and to purchase and take gas therefrom ratably with its own wells and the other wells in the field from which it is purchasing gas, at a price and under terms to be fixed by the Commission, and also that the Commission fix the price to be paid by all purchasers of gas in the Hugoton field, and for such other relief as might be proper.

The State of Oklahoma, on relation of the Commissioners of the Land Office, a constitutional body having the management and control of the State's school and other public lands (Okla. Const., Art. VI, Sec. 32) intervened (171), alleging that the State owns 49,600 acres of school lands in Texas County, in which a portion of the Hugoton field is situated, and over 300,000 acres in the adjoining counties of Beaver and Cimarron, and that it has a direct interest in the cause.

It adopted the averments in Peerless' application, and alleged that when the first wells were drilled in that field there were only a few purchasers of gas therein and a limited market, and arbitrary and monopolistic prices and measurements were put into effect; that intervenor and many others similarly situated, although owners of large acreages, were not consulted as to the price or measurement, but they were fixed by the purchasers on the basis of the gas being a distress commodity; that since then a nation-wide market and a great demand for the gas has developed, and the gas is being depleted at a small fraction of its value. It alleged that there is no market at the well; and it prayed that the Commission fix a price of 10¢ per M for the gas, and require that the same be measured upon the same basis required by the Interior Department for the measurement of royalty gas upon lands of the United States or under its control.

Also, the Texas County Land and Royalty Owners Association intervened and made similar allegations.

The Response

Cities filed a response (46) in which it alleged in substance that it is engaged in producing natural gas for transportation and sale in interstate commerce through an integrated pipe line system extending from Texas into and through Oklahoma and Kansas and into Missouri and Nebraska, and has provided the necessary facilities and has acquired markets. Its business is purely private. It has never held itself out as ready or willing to serve the public generally. It has never been a common purchaser or a common carrier of gas. It has always conducted its

business under private written contracts with selected parties. It has purchased gas under exceptional circumstances and by private contracts from selected sellers solely to enable it to supply adequately its private markets. While it is not required under any valid law or regulation of Oklahoma to purchase Peerless' gas, it has offered and now offers to do so ratably, upon terms to which Peerless has refused to accede. The Commission is without power of jurisdiction to require it to take Peerless' gas or to fix a price therefor, and any statute of the State, if construed to authorize the same, is violative of the commerce clause and of the due process and equal protection clauses of the Constitution of the United States.

THE EVIDENCE

The evidence was to the following effect:

The Hugoton field covers parts of Oklahoma, Kansas and Texas. Its proven acreage in Oklahoma is approximately 1,062,000 acres (417-18). The first well therein was drilled by Wilcox Oil & Gas Company in 1924 (71-72), and it produced gas which was sold at 8 cents per MCF (99).

The entire field is one common source of supply, and gas is much more fugacious than oil (72-3). The average original pressure in the field was about 432 lbs (72). Any well drilled and operated in it will reduce the pressure in the entire field (72). During the year ending in May, 1946, the pressure was reduced $7\frac{1}{2}$ lbs. (74).

Peerless has two wells in that field in Oklahoma, one in Section 5 and one in Section 8. The former was com-

pleted on February 7, 1946. Neither has been connected or is being produced, but both are capable of being so (76-7).

Gas migrates from the higher to the lower pressure areas (75). The area west of Peerless' wells is a low pressure area, the pressure gradually increasing toward the east from 370 to 420 pounds. The movement of the gas is from the Peerless tract to the west (75-6). There are only one or two wells east of the Peerless tract, and they are not being produced (75). On the other hand, Cities has wells in every section north, northwest, west and southwest of Peerless' wells, all of which are producing, while Peerless' wells are not (75). Cities is operating approximately 110 wells in that vicinity and the gas in Peerless' wells is being drained by the wells surrounding them, which drainage has already caused a pressure decline of 12½ lbs. in that area (75-6). In an area five miles square in which Peerless' wells are situated, Cities owns and is operating 14 wells, from which, up to April 1, 1946, it had produced 15,522,079 MCF of gas or an average of 620,833 MCF per section. That has caused a pressure decline in Peerless' wells of 12½ lbs. (77).

In 1945 Cities' 14 wells produced 281,031 MCF per section, and thus drained gas from Peerless' wells in Section 8 (77).

The back pressure in the wells has declined 43 lbs. (77). By dividing the whole amount of the gas produced up to a certain time by the back pressure decline in that time one can get the amount of gas produced per pound of back pressure decline, and thus determine the amount of gas remaining. That method of computing gas reserves is

called the back pressure decline method, and is the most accurate known (77). 360,979 MCF of gas were produced for each pound of back pressure decline, which shows that the future gas production down to 25 lbs. abandonment pressure for that area will be 131,396,356 MCF, or an average of 5,255,854 MCF per section. If Peerless has no outlet, its leases will be entirely drained by other wells (77-8).

The Commissioners of the Land Office own a total of 11,400 acres which is developed and on production, which, on the basis of the recoverable gas in that field, will produce 11,000,000 feet per acre over the life of the field (79).

Because of the expensive nature of gas, there can be no price without a pressure basis. The volume of gas is in proportion to the pressure. To make a comparison as to quantities and prices at different pressures, they must be reduced to a common pressure (421-2).

Atmospheric pressure in the Hugoton field is 13.2 lbs. per square inch (83; 425). Cities buys gas there at 16.45 lbs. (425) or at 3 lbs. per square inch above atmospheric pressure. Buying gas at only 2 lbs. above atmospheric pressure gives the purchaser 10.8% more gas, more heating units than he would get at atmospheric pressure (84; 427-8).

At 4 cents per MCF the loss to the State in gross production taxes alone caused by measuring gas at 2 lbs. above atmospheric pressure, instead of at atmospheric pressure, is more than $47,000.00 annually, and the loss to the producers of gas in the State is more than $942,000.00 annually (87).

The fairest pressure for the measurement of gas is that adopted and used by the United States Bureau of Mines, which is 14.75 lbs. per square inch (87). Gas in the Osage Nation, which is under the jurisdiction of the Secretary of the Interior, is measured at 10 oz. above atmospheric pressure (200; 424).

The price of gas in the field has a direct bearing upon its conservation (119-20; 281-2). It is admitted by those interested in the natural gas industry and the Commissions charged with its regulation that as the price of gas increases greater conservation is achieved (159; 163-4). As gas becomes more valuable, there is greater effort to conserve it (163). The condition in the Cement field in Oklahoma where low prices prevailed resulted in great waste of the gas, both physical and economic. A good deal of it was blown into the air (302-3).

Also, if the price for gas is too low, the producers will abandon their wells long before all the recoverable gas has been recovered, resulting in actual physical waste. Producers will not conserve gas unless they have an incentive to save it (304-5).

A multitude of valuable chemicals can be made from natural gas whereby its value can be increased forty-fold. Fischer-Tropsch gas at 10 cents will produce a barrel of gasoline at 52 cents, equivalent to coal at $1.54 per ton. The price of gas as a fuel, considering its heating value, is far below parity with other fuels (153-9). The heating value of 6,000 cubic feet of gas equals that of a barrel of oil (158). Gas in the Hugoton field is worth in excess of 10 cents per MCF at the well (101; 161-2; 283). Based on

its heating value, and without considering its convenience, the price of gas is below that of any other type of fuel (159).

Based on the current price of crude oil, and comparing its heating value with that of natural gas, the latter is worth 20 cents in the Hugoton field at the wellhead. The price of coal delivered at Coalgate, Oklahoma, and containing 11,500 btu's per lb., is $5.31 per ton. Gas in the Hugoton field contains on the average a thousand btu's per cubic foot at a pressure of 14.73. Compared with coal at Coalgate and without considering freight on the coal, gas is worth 23 cents per MCF in the Hugoton field. Compared with coal f. o. b. McAlester, having 13,500 btu's per lb. and selling at $7.35 per ton, gas in the Hugoton field is worth 27 cents per MCF. Compared with coal in the Henryetta district, which contains 13,000 btu's per lb. and sells at $5.35 per ton, gas in the Hugoton field is worth 20.3 cents (190-1).

When great gas fields have been discovered, usually by accident, there were no nearby markets for even a small portion of the gas, which resulted in a price so low as to be merely a token price (158). The major companies acquired large blocks of acreage; leaseholders and smaller operators not having financial backing and resources had no opportunity to market their gas, and the result was that prices were depressed and have remained so (162-3).

The practice of measuring gas above atmospheric pressure originated when pipe lines were leaky and for the purpose of compensating for the leakage. Now the pipe lines are welded and tight and that reason no longer

exists. The practice is merely a carry-over from the earlier days and is antiquated (166).

The Commissioners of the Land Office own in trust for the State 49,600 acres of land in the Hugoton field in Texas County. Of that, 30,160 acres are under lease, and 6,099.92 acres are producing gas at this time, and the Commissioners are receiving 4 and 5 cents per MCF for their royalty gas (182-3). They have been offered contracts providing for a price of 3.34 cents per MCF which they have refused, and as a result those wells have not been produced (183-4).

Republic Natural Gas Company pays the Commissioners royalty on the basis of 5 cents per MCF for the gas it takes.

In 1916 the price of gas at the well in the Osage Nation in Oklahoma, which is under the jurisdiction of the Secretary of the Interior, was fixed by the Secretary at 18 cents per M measured at 10 oz. above atmospheric pressure. That price has been maintained ever since, and Cities is one of the purchasers and is paying that price at the wellhead at this time (200). No gas is sold in the Osage at less than that price except that Anderson-Prichard Oil Corporation is selling gas to Cities in the Osage at 7 cents per M (201-2).

Hazel-Atlas Company at Ada is paying 11 cents per M for gas, and its officer testified before the Federal Power Commission that it could pay 30 cents and still make a profit (106-7).

Cities has made contracts with Magnolia and Stanolind Oil and Gas Company to purchase gas from them in

the Hugoton field and to pay them 6 cents per M therefor (410).

Cities has 122 wells of its own connected and producing in the Hugoton field in Oklahoma. There are approximately 240 producing wells in the field at this time (348). Cities purchases gas from 80 wells of Republic Natural Gas Company in that field and 35 wells of Skelly Oil Company (348-9). It has recently made contracts with Don Harrington, Cities Service Oil and Gas Company, and Magnolia Petroleum Company for the purchase of their gas at 6 cents per M (549). It owns 102,463.9 acres of leases in the Hugoton field in Oklahoma (400). Republic Natural Gas Company has dedicated to Cities by contract 96,000 acres in that field, and it has 56 wells connected to Cities' pipe line from which gas is being taken (401-2). Skelly has approximately 47,000 acres which are dedicated to Cities and 38 wells thereon are connected. Those contracts provide that all of the acreage is dedicated to Cities for the life of the leases (402).

Peerless has over 100,000 acres of leases and is the only one whose wells are unconnected (405). If Cities has Harrington & Marsh under an acreage dedication, then it has the greater part of the field not owned by pipe line companies (406). Its contract with Harrington & Marsh covers 19 wells and gives the right to connect with such other wells as it sees fit from time to time. Harrington & Marsh have about 75,000 acres of leases (407). Cities is purchasing from only three producers in that field but it purchases from about 50 producers in the State (410). Out of 300 wells in the entire field, Cities is connected to 236 (409).

Cities sells gas from the Hugoton field to Consolidated Gas Company at Blackwell, Oklahoma, for distribution for light, heat and power purposes in Blackwell and Tonkawa. It also sells gas to Kay County Gas Company, which supplies Ponca City, Newkirk and other towns in Oklahoma. It also sells gas from the Hugoton field for light, heat and power purposes to other places in Oklahoma (411-12).

Peerless tendered its gas to Cities at 6 cents per MCF (417). Stanolind's and Magnolia's gas which Cities has contracted to purchase at 6 cents, is in the Hugoton field (419).

Cities Service *Oil* Company, an affiliate of Cities, has a processing plant in the Hugoton field in which it removes from the natural gas the gasoline and other hydrocarbons, and the greater part of the gas which Cities takes out of that field is run through that processing plant The product taken out is valuable and salable (461-3).

Empire Gas and Fuel Company, the name of which was later changed to Cities Service Gas Company, bought the properties of Kansas Natural Gas Company, Marnett Mining Company, Wichita Natural Gas Company and Wichita Pipe Line Company in 1922. Empire Gas and Fuel Company was not previously doing business in Oklahoma, and had not qualified (415-16). It qualified in the State on April 19, 1922. Later it was reorganized under the name of Cities Service Gas Company and the latter qualified on August 3, 1927. Cities admits that since that date it has had a permit from the State to do business therein, and has been buying and selling gas for light,

heat and power purposes, but denies that it has done so "under that permit" (210-11).

During the hearing Cities entered into a written stipulation with Peerless to take gas from the latter's wells without prejudice to the final determination of the cause as to measurement and price (211).

The Orders
(11; 19)

In its orders the Commission found in substance as follows:

The Hugoton field is one common source of supply of gas. There are approximately 300 wells therein some of which are not connected to pipe lines and therefore are not producing. The original pressure in the field was 448 lbs., but has now been reduced to 400 pounds. The total reserves are about seven trillion cubic feet (par. 4).

Peerless is the owner of leases covering approximately 110,000 acres, on which it has drilled two wells (par. 5). Cities is the owner of various gas wells from which it is and has been taking gas from the same reservoir into which Peerless wells have been drilled (par. 7), and is engaged in the transportation of gas for compensation, hire and otherwise from that common source of supply (par. 8).

The production of gas in that field is in excess of market demand (par. 9).

Cities is engaged in buying and selling gas in that field and in other places in the State of Oklahoma, and is a

common purchaser thereof within the meaning of the State's statutes. It purchases gas from more than 50 persons, firms and corporations in the State (par. 10).

It is using the highways of the State for the purpose of laying gas pipe lines and transporting gas, and is in fact a common carrier of natural gas (pars. 12 and 13).

It is engaged in taking gas from the Hugoton field for purposes other than the development of a gas or oil field, or operating oil wells, or for its own domestic use (par. 14).

It produces and purchases gas in Oklahoma and transports and sells the same both directly and indirectly to the public for light, heat and power (par. 15).

It maintains and operates pipe lines for the transportation of gas in and from the Hugoton field, one of which lines is in close proximity to Peerless' wells involved herein (par. 16).

It qualified to do business in Oklahoma after the passage of the acts invoked here which fixed its duties and obligations, and thereby accepted and agreed to comply with the same (par. 17). It qualified with knowledge of the laws of the State relating to natural gas and the taking thereof, and was thereafter a party in the case of *Oklahoma Natural Gas Company* v. *State*, 161 Okla. 104, 17 Pac. (2d) 488, which required ratable taking of gas under an order similar to that sought in the instant case. Its operations constitute it a transporter of natural gas (pars. 17, 18 and 19).

A dispute has arisen between Peerless and Cities as to the price, measurement and terms of the latter's taking

of gas from the former's wells producing from the same common source of supply. Prior to the filing of this proceeding Peerless made a tender of the gas from its wells to Cities, and the latter signified its willingness to take the same, but refused to pay therefor more than 4 cents per MCF, measured at a pressure of 2 lbs. above atmospheric, and it refused to take the gas at all unless Peerless would dedicate to it the gas from all its leases in that field for the life of the leases, and the dispute as to the price, measurement and terms of taking arose as a result thereof (pars. 20 and 21).

Cities continued to refuse to take gas from Peerless, unless Peerless would dedicate to it the gas from all its acreage in the field at a price of 4 cents per MCF for the life of the leases, until long after the filing of this application, when Peerless and Cities agreed that said well should be connected to Cities' pipe line, and that the latter would take gas therefrom, that Cities would make payment upon the purchase price at 4 cents per MCF plus ½ cent for gathering and delivering charges, or a total of 4½ cents per MCF delivered into Cities' pipe lines, without prejudice to a final determination of this controversy as to measurement and price, and that in the event a higher price or a different measurement should be finally fixed and upheld, Cities would pay to Peerless the difference between the amount previously paid and the price as fixed by the Commission, all as evidenced by their stipulation on file herein (pars. 22 and 32).

The corporations operating pipe lines and transporting gas out of the Hugoton field own or control the greater portion of the leases in said field, and control all the out-

lets for the gas produced, and have been able to dictate and have dictated the price, measurement and terms of the taking, and the producers without a connection have been required to accept the same or close their wells (pars. 23 and 33). There is no competitive market for gas in the Hugoton field, it having been stifled by the control of acreage and markets by the pipe line operators therein, and as a result gas is being taken out of the field at a price for less than its value for heating and other purposes as compared to the value of other fuels, and a great resource of the State is being depleted at a price far less than its value (pars. 24 and 34; and 25 and 35).

Cities purchses gas in that field under contracts containing different terms and conditions, as evidenced by its contract with Skelly Oil Company, its contract with Republic Natural and its contract with Hagy, Harrington & Marsh (pars. 27 and 37).

Cities' operations constitute it a common carrier and a common purchaser of gas and a public utility (pars. 28, 29, 30 and 31; 39, 40, 41 and 42).

The taking of gas from said field at the prices and under the terms and measurements now prevailing, results in and causes both economic and physical waste of gas, loss to producers and royalty owners, loss to the State in gross production taxes, inequitable taking of gas from the common source of supply, and discrimination against various producers in the field (pars. 32 and 44). The Commission has authority to and should fix a minimum price and terms for the taking of natural gas in said field, and it does so for the purpose of preventing waste of the gas, both economic and physical, and for the purpose of pro-

tecting the correlative rights of the producers (pars. 33 and 34; 45, 46 and 47).

"It is therefore ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That the respondent Cities Service Gas Company be and it is hereby required to take natural gas ratably from applicant's well located in Section 8, Township 4 North, Range 16 ECM, Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in Order No. 17867 of this Commission.

"2. That the respondent Cities Service Gas Company be and it is hereby required to take natural gas ratably from applicant's well located in Section 5, Township 4 North, Range 16 ECM, Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in order No. 17867 of this Commission.

"3. That respondent shall pay to applicant for the natural gas so taken not less than 7 cents per M cubic feet of natural gas at the wellhead measured at a pressure of 14.65 lbs. absolute per square inch.

"4. That no natural gas shall be taken out of the producing structures or formations in the Guymon Hugoton field in Texas County, Oklahoma, for a price at the wellhead of less than 7 cents per M cubic feet of natural gas measured at a pressure of 14.65 lbs. absolute per square inch.

"5. This order shall be effective as of January 1, 1947."

Upon appeal those orders were held valid by the State Supreme Court. The decision has not yet been officially reported, but may be found in 220 Pac. (2d) 279.

ARGUMENT AND AUTHORITIES

I.

The Statutes Involved

Two of the statutes involved were passed in 1913 (Okla. Sess. L. 1913, pp. 166 and 439), the pertinent provisions of which are now contained in Okla. Stat. 1941, Title 52, Sections 23-5 and 231-3. Another was enacted in 1915 (Okla. Sess. L. 1915, p. 398), and its relevant provisions are found in Okla. Stat. 1941, Title 52, Sections 239 and 240. They are set forth in the Appendices.

The 1913 Acts are so explicit as not to need interpretation. They declare that gas underlying any land is the property of the landowner or his lessee; that they may take gas from a common source proportionately to the natural flow of their wells, and that the drilling of a well by an owner or lessee shall be regarded as reducing to possession his share of the gas. And they provide that any person taking gas from the field, except for the development of a gas or oil field, operating oil wells, or for his own domestic use, shall take ratably from each owner in proportion to his interest, upon such terms as may be agreed upon, or, if they cannot agree, then at such price and upon such terms as may be fixed by the Commission after notice and hearing (Appendices A and B).

They explicitly authorize the order requiring Cities to take gas from Peerless ratably and fixing the price therefor.

The Oklahoma Supreme Court on appeal construed the 1915 Act (Appendix C) as going further, and as au-

thorizing the Commission, for the prevention of waste, both physical and economic, the protection of the correlative rights of owners and producers, and for the general welfare, to fix a minimum price and the basis of measurement of gas in the field and to prohibit its taking at a lesser price.

That decision is binding upon this Court as to the meaning and intent of those acts and their accordance with the State's Constitution (*Hicklin* v. *Coney*, 290 U. S. 169, 172; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Railroad Commission*, 283 U. S. 380; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673; *Williams* v. *Kaiser*, 323 U. S. 471; *Oklahoma Tax Commission* v. *Texas Company*, 336 U. S. 342; *Terrace et al.* v. *Thompson*, 263 U. S. 197, 224; *Georgia Ry. & Electric Co.* v. *City of Decatur*, 295 U. S. 165; *Rasmussen* v. *State of Idaho*, 181 U. S. 198; *Lehman* v. *State Board of Public Accountancy*, 263 U. S. 394; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Smiley* v. *State of Kansas*, 196 U. S. 447).

It follows, therefore, that this Court will take those statutes as intending to confer the power which the Commission exercised, and as not violating any provision of the State's Constitution; and this Court's sole function is to determine whether the statutes so construed and the orders made under them are violative of the Federal Constitution in the respects alleged.

Appellant denies that. It asserts that this Court may reverse a state court's construction of a state statute if this Court would construe it differently—that a state court's erroneous construction of a local statute in and

of itself constitutes a violation of the Federal Constitution, although the statute would be valid if it in fact means what the state court held it to mean. And it says that the Oklahoma Court's holding that the provisions in the statutes conferring upon the Commission power to require ratable taking and "equitable purchasing" authorized it to require appellant to take Peerless' gas ratably and to fix the price therefor is erroneous, and, because it is erroneous, is violative of the Federal Constitution, although the statutes themselves would not be so if they expressly granted that power.

Of course, that is not true. This Court takes the law of the State to be what the highest State Court declares it to be, whether that law be statutory or the common law of the State; and its function is only to determine whether the law so declared violates the Federal Constitution.

The authorities which appellant cites do not support its position. They go only to the proposition that where a state court decides a case involving a federal question upon a non-federal ground, this Court will examine the non-federal ground asserted to ascertain whether it is sufficiently substantial to warrant disregard of the federal question, and whether the decision upon it was arbitrarily made for the purpose of evading the federal question.

This case presents no such situation. The constitutional questions involved were met squarely and determined. Appellant contended, not only that the statutes did not confer the power upon the Commission, which was solely a question of state law, but that, if they did so, they and the order made under them were unconstitutional

and void; and the State Court held that the statutes did confer the power, and that they and the order were constitutional and valid. There was no evasion of the constitutional questions.

II.

By entering the state and there engaging in the business of buying and holding gas leases, drilling and operating gas wells, and purchasi gas, all after the enactment of the statutes which conditioned its right to do that business in the state, appellant accepted the terms and provisions of those statutes, and is therefore barred from questioning their constitutionality.

Appellant is a foreign corporation. Oklahoma had the right for any reason or without reason to prohibit it from doing any but an interstate business therein (*Asbury Hospital* v. *Cass County*, 326 U. S. 207; *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562; *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494; *St. Clair* v. *Cox*, 106 U. S. 350; *Hemphill* v. *Orloff*, 277 U. S. 537; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *State of Washington ex rel.* v. *Superior Court*, 289 U. S. 361), or to prescribe the conditions upon which it could do so (*Lincoln Nat. Life Ins. Co.* v. *Read*, 325 U. S. 673; *Horn Silver Min. Co.* v. *New York State*, 143 U. S. 305; *Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Paul* v. *Virginia*, 8 Wall. 168; *Hanover Fire Ins. Co.* v. *Carr, supra; LaFayette Ins. Co.* v. *French*, 59 U. S. 404; *St. Clair* v. *Cox, supra; Orient Ins. Co.* v. *Daggs, supra; Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22).

As to appellant and its intrastate business, Oklahoma prescribed those conditions in 1913 and 1915. Seven years

after the enactment of the latter Act, Empire Gas & Fuel Company, which is now Cities, entered the State, obtained a permit, and commenced the business of acquiring, holding and drilling gas leases, producing gas, and purchasing gas from others.

That constituted an acceptance of the conditions upon which that privilege was granted, and appellant is exercising the privilege today. It has acquired and owns leases upon large tracts of land in the Hugoton field and in other fields of the State. It has drilled and is drilling wells thereon, has produced and is producing gas therefrom, and has purchased and is purchasing gas from others, all being acts which the State had the right to forbid appellant to do, or to prescribe the conditions upon which it could do them.

In *The Pipe Line* cases, 234 U. S. 548, this Court held that the Hepburn Act, though not compelling existing corporations engaged in interstate transportation of oil to continue in operation, nevertheless forbade them to continue to transport oil purchased by them from others except as common carriers; and as to pipe lines constructed after the passage of that Act, the Court said, "So far as the statute contemplates *future pipe lines and prescribes conditions upon which they may be established, there can be no doubt that it is valid.*"

Also, in *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, this Court said:

> "By accepting the privilege it (appellant) voluntarily consented to be bound by the conditions attached to it, and, while enjoying the benefits of that

privilege it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the state, is unconstitutional."

That holding has been cited and followed in many cases. See *United States* v. *Traugott Schmidt & Sons* (DC), 2 Fed. (2d) 290; *Dunn* v. *Fort Bend County et al.* (DC), 17 Fed. (2d) 329; *Eichholz* v. *Hargus et al.* (DC), 23 Fed. Supp. 587; *Valvoline Oil Co.* v. *United States*, 25 Fed. Supp. 460; *Henderson* v. *Twin Falls County*, 59 Idaho 119, 80 Pac. (2d) 801, 810; *Byard* v. *Commissioner of Taxation*, 209 Minn. 219, 296 N. W. 10; *Louisiana Ry. & Nav. Co.* v. *State* (Tex. Civ. App.), 298 S. W. 462, 467; *Assessment of Champlin Refining Co.*, 129 Okla. 166; *Fitzsimmons* v. *Rauch*, 195 Okla. 529, 532.

If appellant had expressly contracted with the State that, in consideration of its admission, it would conform to those statutes, unquestionably it could not attack their validity. An implied contract, however, is equally binding, and appellant's acceptance and exercise of the privileges granted upon the conditions embodied in the statutes constituted such implied contract and effectually estops it.

That means that appellant cannot question the constitutionality of the acts declaring it a common purchaser of gas, requiring it to purchase ratably, and authorizing the Commission to fix the price therefor.

Of course, if the Commission, in requiring appellant to purchase ratably, had fixed the price so high as to entail loss upon it or prevent it from making a profit, it would not be precluded by its acceptance of the statutes from asserting that the order deprives it of property without

due process, any more than a public utility, under an admitted duty to serve and whose rates are subject to regulation, is precluded from attacking a rate fixed as confiscatory.

III.

Neither the statutes nor the orders violate the 14th Amendment.

In General

In addition to the acceptance and estoppel just mentioned, it is settled that the states have power to prohibit the waste of their natural resources, including natural gas, oil and water, and power to protect the correlative rights of their owners (*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Hunter Co., Inc.* v. *McHugh, Commissioner*, 320 U. S. 222; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Henderson Co.* v. *Thompson*, 300 U. S. 258; *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376).

Also, in so doing, the states may take into consideration not only individual interests, but also the effect upon their own economies (*Railroad Commission* v. *Rowan & Nichols Oil Corp.*, 310 U. S. 573).

Since Oklahoma has those powers, it has power to adopt whatever reasonable means are necessary to effectuate them. If necessary to that end, it has power to prevent

a producer having a pipe line and a market from draining and selling the gas from the leases of adjacent owners by requiring him either to abstain from producing or to purchase the others' gas ratably at a price to be fixed by the Commission, an impartial body, after a hearing safeguarded by the right of judicial review by its Supreme Court and ultimately by this Court.

The fact that the only alternative to ratable taking and purchasing by a producer engaged in taking and purchasing is to close his own wells and cease to purchase, does not render the statute void. In *Walls* v. *Midland Carbon Co., supra,* it was contended that enforcement of the statute would prevent the producer from taking and using its gas and destroy a large investment; but it was held that that fact did not invalidate the statute. This Court said that "the determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights, * * * which the state has an interest to adjust and preserve, natural gas being one of the resources of the state; and in this case it is more important to consider, not for what a particular owner uses the gas, but the proportion of that use to others, or it may be the prevention of use by others."

In *The Pipe Line cases,* 234 U. S. 548, it was held that the only alternative to compliance with the statute was for the pipe line companies to cease their business, but that nevertheless the statute was valid.

In *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, it was contended that enforcement of the statute against the waste

of gas would prevent the production of oil and destroy the company's business, but this Court said that the contention went "not to the power to make the regulations but to their wisdom", and that notwithstanding the facts alleged, the act was valid.

In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, the statute forbade the use of pumps to bring to the surface water charged with gas, and the company alleged that the water could be so brought only by pumps, and that the enforcement of the act would wholly prevent it from obtaining the water; but a demurrer to the company's bill, which admitted the facts alleged, was sustained, and this Court held the statute valid.

In *Bacon* v. *Walker*, 204 U. S. 311, this Court said that, where the power of regulation exists the imposition of some limit to a right, when its exercise will impinge upon the equal right of another, is the exercise of legislative power, and the circumstances which induce it can not be pronounced illegal "on surmise or on the barren letter of the statute"; and that where equal rights exist the state has an interest in their accommodation. "A state may consider the relation of rights and accommodate their coexistence, and in the interest of the community, limit one that others may be enjoyed" (*Walls* v. *Midland Carbon Co.*, 254 U. S. 300, 315). See also *Henderson Co.* v. *Thompson*, 300 U. S. 258.

Natural gas is a valuable resource of the state. Of all known fuels it is the cheapest, the most convenient to use, and the most satisfactory. It has twice the heating units of manufactured or artificial gas. It cannot be

created by man, and, when used or wasted, is gone forever. Already untold trillions of cubic feet have been irretrievely lost. The state therefore has a legitimate interest in the conservation of the remainder, both from the standpoint of its inhabitants and their welfare and from that of its own revenues derived from production taxes thereon. It derives no revenue from the gas that is wasted.

It is next to impossible to enforce conservation of gas without giving its owners an incentive to conserve it. If it is to be saved, it must be made worth saving. An owner who has and can obtain no market for his gas, or who can obtain only a pittance for it, naturally will consider and treat it as valueless, and will expend neither money nor effort to save it.

Also, when the price is too low, owners sell their flush production for what they can get, but when the pressure and volume decline they plug and abandon their wells and retrieve their casing and equipment long before all the recoverable gas has been recovered, thus leaving in the ground large quantities that can never thereafter be recovered. The matter of price, therefore, is inextricably linked with conservation, and the ridiculously low price being paid for gas in the Hugoton field constitutes not only an economic waste of one of the State's natural resources, but is also conducive to its actual physical waste.

A gas pool usually underlies the lands of several owners, and it does so in this case. While the surface is divisible by property lines, the pool is indivisible, and is owned in common by the surface owners. An owner may

fence his surface and prevent trespass thereon, but he cannot fence in the gas that underlies it; and every thousand cubic feet taken from the pool diminishes the quantity in the pool that much and the quantity underlying the land of each owner proportionately. The result is that an adjacent producer who has a pipe line and a market has the physical power to take from the pool and appropriate not only the gas underlying his land but also that underlying his neighbor's land. In this case appellant was doing that; and the question is whether the State is constitutionally powerless to prevent its doing so without making compensation to its neighbor.

The surface owners are the owners in common of the gas pool underlying their lands. If they were not so at common law, there is nothing in the constitution which prevents the Legislature from making them so, from declaring the legal effect of the situation, and protecting the co-equal rights of the owners. Oklahoma has done so. Section 231, Okla. Stat. 1941 (Appendix A), enacted in 1913, provides:

> "All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners or gas lessees of the surface under which the gas is located in its original state."

That accords with our sense of morality and justice. If a landowner should be denied protection of the property right which it creates or declares, it would be, not because he is without right, but because the injury is one for which the law affords no remedy. But, if the right exists, then it is competent for the State to furnish a remedy.

Oklahoma's Constitution (Art. II, Sec. 6) provides that speedy and certain remedy shall be "afforded for every wrong and for every injury to person, property or reputation."

A person does not have and cannot constitutionally be granted the right to appropriate his neighbor's property without compensation because it is necessary to appropriate it in order to utilize his own. The several surface owners own the underlying gas pool in common. But a tenant in common who appropriates or uses the common property is required to account to his co-owners in proportion to their interest in it.

If the State could accomplish its purpose to conserve natural gas and protect the correlative rights of owners by some other means less drastic, possibly it would be its duty to adopt such means rather than to prevent a producer who has a pipe line and a market from producing his wells without ratably purchasing gas from the adjacent leases; but there are no other means. The question has engaged the best thought of the legislatures of the gas producing states, without success, in evolving an effective remedy that is less drastic. In *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 579, this Court said that the protection of the co-equal rights of producers of oil in the same field "is as thorny a problem as has challenged the ingenuity and wisdom of legislatures." But, because gas is more fugacious than oil and cannot be stored outside its natural reservoir as oil can the problem as to it is even more difficult. There is no alternative. The State must either require what the Oklahoma Supreme

Court holds that the acts in question require, or else must permit a producer who is so fortunate as to have a pipe line and a market to appropriate his neighbor's gas without compensation.

If, as held in *Noble State Bank v. Haskell*, 219 U. S. 104, 110, the state may constitutionally require banks to contribute to a fund to pay debts of a failing rival in business, then Cities' plea of unconstitutionality fails. The Act is a police measure as to which the state has broad powers, and it is reasonably adapted to the ends sought to be achieved. Also, at other times and places the same law may be beneficial to Cities, and the ultimate benefit to it may balance its burden. As said in the *Noble State Bank* case, "The share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

There is no question that appellant is a common purchaser under the statute. The evidence showed that it purchases from several producers in the Hugoton field; it purchases in the Osage Nation; and its own witnesses testified that it purchases from more than fifty producers in the State. It came into the State and obtained a permit under two statutes, one of which provided that any person taking gas from a gas field shall take ratably from each owner of the gas in proportion to his interest therein (Appendix A, Sec. 233), and the other, that every corporation then or thereafter engaged in the business of purchasing natural gas shall be a common purchaser thereof and shall purchase all the gas in the vicinity of its pipe line ratably and without discrimination in favor of its own production (Appendix B, Sec. 23).

Appellant's character is to be determined by the statutes under which it was admitted to do business and by the business it does. It says that it purchases only by private contract and from selected sellers. In *Terminal Taxicab Co., Inc.* v. *Kutz et al.*, 241 U. S. 252, the taxicab company made the same contention. Its charter even provided that it should not be or exercise any of the powers of a public service corporation. But this Court held that its character was to be determined by what it did, and that the fact that it carried passengers only under contracts with the owners of the Union Railway Station and of hotels in Washington did not prevent it from being a common carrier, and that it was subject to regulation as such by the Public Utilities Commission of the District of Columbia. Practically all common carriers and public utilities enter into contracts with their patrons. Railroads issue bills of lading and tickets which are contracts, and water, gas and electric companies require contracts. But admittedly they are public service corporations.

The question, therefore, comes to this: Does a state law which forbids a producer of gas who is so fortunate as to have a pipe line and a market from draining and selling his neighbor's gas except upon the condition that he take it ratably and pay for it at a price to be fixed by an impartial body, whose decision is subject to review by the State Supreme Court and by this Court, violate the 14th Amendment? Certainly it does not.

The laws in question are within the police power of the state. They only require appellant to so use its own as not to injure others or the State. Appellant's intrastate

business is affected with a public interest. In *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, it was held that such an interest can exist in a business distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved therein. It held that a business by circumstance and its nature may rise from private to public concern, and consequently become subject to governmental regulation in its rates, prices and practices. See also *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71; *Munn* v. *Illinois,* 94 U. S. 113, and *Nebbia* v. *New York,* 291 U. S. 502, 531-37.

In the exercise of its police power, a state may forbid as inimical to public welfare the prosecution of a particular type of business or regulate it in such manner as to abate evils deemed to arise from its pursuit (*Great Atlantic and Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412). Its regulations may be designed to promote the public convenience or the general prosperity as well as the public health, morals or safety (*Chicago, B. & Q. Ry. Co.* v. *Illinois,* 200 U. S. 561). In the exercise of that power, the state has wide discretion in determining its own public policy and what measures are necessary to effectuate them (*Terrace* v. *Thompson,* 263 U. S. 197). Where the public interest is involved preferment of that interest over individual property interests is a characteristic of the police power (*Miller* v. *Schoene,* 276 U. S. 272). Considerations of financial loss or of so-called vested rights in private property are insufficient to outweight the necessity for legitimate exercise of the police power (*Hadacheck* v. *Sebastian,* 239 U. S. 394; *Rein-*

man v. *City of Little Rock*, 237 U. S. 171; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Atlantic Coast Line Ry. Co.* v. *City of Goldsborough*, 232 U. S. 548; *Chicago & A. Ry. Co.* v. *Tranbarger*, 238 U. S. 67; *Standard Oil Co.* v. *City of Tallahassee* [5 C. C. A.], 183 Fed. [2d] 410, 413).

In *Nebbia* v. *New York*, 291 U. S. 502, 537, in which a commission pursuant to a state statute had fixed the price of milk, this Court, speaking of the police power, said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.* * * * And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent

with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

If a state has power to prescribe drilling units, to require the combination of smaller units into a drilling unit, to apportion to each owner his fair share of the cost of the well and of the production therefrom, and to prevent the owners from drilling separate wells on their tracts (*Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376), then certainly it has power to require a producer having a pipe line and a market to purchase the gas which it drains from its neighbors' wells and to pay a reasonable price therefor.

The dissenting opinion of the late JUSTICE RUTLEDGE, concurred in by JUSTICES BLACK, MURPHY and BURTON, in the similar case of *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, answers appellants' contentions, and no contrary opinion on the merits was expressed by any Justice. The majority held only that, because no price for the gas had been fixed, the judgment of the State Court lacked the finality necessary to its review here. The dissenting Justices were of opinion that, since the order required Republic to commence taking gas at once, the question on the merits was not unrelated to that of finality. Because that opinion says what we wish to say, and more clearly and forcibly than we can say it, and is as easily read here as in the report, we may be pardoned for quoting from it at length. The learned Justice stated the question on the merits as follows (p. 89):

"The question as cast in legal terms is whether the due process and equal protection clauses of the Fourteenth Amendment deny Oklahoma the power to give one private producer from a common pool the option

to shut down production altogether or to purchase gas from another for the purpose of adjusting their correlative rights in the pool, when that is the only practical or feasible alternative consistent with production by both to protect the latter from drainage by the former.

"Republic denies the state's power to do this. Its basic position is that it has a federal constitutional right to drain off all the gas in the field, unless other owners of producing rights can supply their own facilities for marketing their production, regardless of varying conditions in different competitive situations and regardless of all consequent practical considerations affecting feasibility of furnishing such facilities."

And he held that Republic had no such right, saying:

"The basic question here is really one of substantive due process. It relates primarily to whether Oklahoma can curtail the unqualified right of capture which appellant conceives it acquired by virtue of and as an unalterable incident to its acquisition of surface rights including the right to drill for gas. For, in denying that the state can enforce the only feasible method of limitation consistent with production by Peerless, Republic in effect is saying that the state cannot restrict its right to take all gas in the common reservoir, including all that can be drained from beneath Peerless' lease and the lands of other owners similarly situated. This is, for the particular circumstances, a denial of the state's power to protect correlative rights in the field or to regulate appellant's taking in the interest of others having equal rights proportionate to their surface holdings. For, though Republic concedes it is bound by Oklahoma's statutory requirement of pro rata production, that requirement becomes merely a time factor affecting the rate

and length of the period of Republic's drainage, not the total quantity eventually to be taken, if Republic can defy the commission's order and thus leave Peerless in its present helpless condition.

"The contention is bold and far reaching, more especially when account is taken of the nature of the industry. Natural gas in place is volatile and fugitive, once a single outlet is opened. When extracted it cannot be stored in quantity, but must be marketed ultimately at burner tips in the time necessary for conveyance to them from the well mouth. The competitive struggle for the industry's rewards is particularly intense in the initial stage of developing a field. By the industry's very nature large outlays of capital are required for successful continuing production and marketing. All those factors however tend toward monopoly once success has been achieved in a particular field.

"These peculiar qualities, moreover, have been reflected in the legal rights relating to the ownership of gas in place, as well as its extraction. They have been adapted to its nature and to that of the competitive struggle regarding it."

Further on, he said:

"In accordance with Oklahoma's law, appellant does not assert title to the gas in place. It asserts only the right to capture what it can produce. But that right, unqualified, would include the right to take gas from beneath others' lands. So taken, it defies their rights to a proportionate share and the state's power to secure them, if for reasons rendering marketing through their own facilities unfeasible they cannot join in the unrestrained competitive draining.

"So far as the federal Constitution is concerned, there is no such unrestricted fee simple in the right

to drain gas from beneath an adjacent owner's land. It is far too late, if it ever was otherwise, to urge that the states are impotent to restrict this unfettered race or to put it upon terms of proportionate equality by whatever measures may be reasonably necessary to that end. Indeed our constitutional history is replete with instances where the states have altered and restricted schemes of property rights in response to the public interest and the states' local needs."

In note 31, on page 95, he said:

"Under certain circumstances a state may compel one individual to surrender private property solely to enable another to exploit the potential resources of his private property. Thus in *Clark* v. *Nash*, 198 U. S. 361, the plaintiff's land could be made productive only by enlarging an irrigation ditch across defendant's land, and in *Strickley* v. *Highland Boy Gold Mining Company*, 200 U. S. 527, the mining company could deliver its ore to market only by constructing an aerial bucket line across defendant's land. Here Peerless can exploit its property only if Republic is compelled to take its gas to market. Moreover, until Peerless is able to produce the gas under its land, this gas will continue to be withdrawn by Republic. In effect Republic is now exploiting Peerless' property."

He then said:

"The remaining narrow issue is whether the most practical method of achieving a fair accommodation of the correlative rights of the parties is invalid because Republic is required to take and to pay for gas that it does not want—at least does not want if it must pay for it.

"Appellant relies heavily on *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, where this Court in-

validated an order limiting respondent's production so severely that it would have had to purchase gas from unconnected wells in its vicinity in order to satisfy its commitments. Thus the necessary effect of that order was comparable to the effect of the order under review here.

"But there is a crucial difference between the cases. In deciding the *Thompson* case the Court explicitly assumed that the order could be upheld if reasonably designed either to prevent waste or 'to prevent undue drainage of gas from the reserves of well owners lacking pipe line connections.' Because of a geological anomaly there was a general drainage in the gas field away from the connected wells toward the unconnected wells, 300 U. S. at 71-73, so that the producing wells, rather than draining gas away from the dormant wells, would only reduce their own loss by producing as much as possible. Therefore the limitation on their production could not be justified, since it was neither for the purpose of preventing waste nor a reasonable regulation of correlative rights. Instead of protecting one party from loss, it operated to aggravate the effect of the drainage away from the owners of connected wells. They suffered, not only by an increased drainage loss, but also by the consequence that they were forced to share their facilities and market with the very parties who profited by their loss. The Court held that such an order requiring one company to share its market with another was unconstitutional inasmuch as it was not justified either as a conservation measure or as a reasonable adjustment of correlative rights. The latter justification is present in this case.

"The fact that Republic is compelled either to purchase Peerless' gas or to carry it to market and account for the profits does not make the regulation unrea-

sonable. If that were the sole cause for complaint, the state could take the more drastic step of requiring all the well owners to shut down completely until all were able to produce on a ratable basis or come to some agreement effective to make this possible. It is clearly within the state's power to require Republic to compensate Peerless for the gas drained from under the *Peerless* land. *Patterson* v. *Stanolind Co.*, 305 U. S. 476. Here, instead of requiring Republic to make a cash payment based on the estimated amount of drainage, the commission has selected what is unquestionably a more accurate method of adjusting the correlative rights. Even if it could be assumed that this method imposed a somewhat heavier burden on Republic than possible alternatives, it does not follow that the method selected by the commission is unconstitutional. For we have constantly recognized the propriety of allowing wide discretion to the administrative agencies who are best qualified to select the most reasonable resolutions to the thorny problems that accompany regulation in this highly technical field. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573. Keeping in mind the fact that property law is peculiarly a matter of local concern, the special difficulty of defining and regulating property rights in natural gas, the respect due to experts in this field, and the rather unusual facts this record presents, I cannot say that the state is without power to enter this order."

Noticing the distinction there pointed out between that case and *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, namely, that in the latter "there was a general drainage in the gas field away from the connected wells toward the unconnected wells (300 U. S. 71, 73) so that the producing wells, rather than draining gas away from the dormant

wells, would only reduce their own loss by producing as much as possible", the situation here is exactly the reverse. The evidence, without dispute, showed that gas migrates from high to low pressure areas, that Peerless' wells are in the higher and appellant's in the lower pressure areas, and that that accelerated and intensified appellant's drainage of Peerless' wells (75-76).

The statutes and orders in their general purpose and effect are not unconstitutional.

IV.

Appellant's Particular Contentions

(a) The statutes and the orders are not so vague or uncertain as to constitute a denial of due process.

The 1913 Acts, pursuant to which the order against Cities by name was made, are explicit. They declare that the natural gas under any land is the property of the landowner or his lessee, and that any person taking gas from a common source shall take ratably from each owner upon such terms as may be agreed upon, or, if they cannot agree, then at such price and upon such terms as may be fixed by the Commission (Appendix A). They further declare that every corporation engaged in purchasing natural gas shall be a common purchaser, and shall purchase all the natural gas in the vicinity of its pipe line ratably and without discrimination (Appendix B). And the order (No. 19515) requires that appellant take gas ratably from Peerless, and pay therefor 7 cents per MCF measured at a pressure of 14.65 lbs. It is difficult to conceive how the statute or order could be more explicit.

The 1915 Act (Appendix C) provides that whenever the full production from any common source exceeds the market demand, then any person having the right to produce therefrom may take only such proportion of the gas that may be marketed without waste as the natural flow of his wells bears to the total natural flow of such common source of supply, having regard to the acreage drained by each well, so as to prevent such person from obtaining an unfair proportion of the gas. And it provides that every person engaged in purchasing gas in the State shall be a common purchaser, and shall purchase ratably and without discrimination; and that the Commission shall have authority to make regulations for the equitable purchasing and taking of all such gas. The Supreme Court held that the Commission's power to make regulations for the equitable purchasing and taking of all such gas included the power to fix the price therefor. That statute, as construed by the Supreme Court, is not vague, indefinite or uncertain.

Nor is the general order prohibiting the taking of gas from the field at a price less than 7 cents per MCF, as interpreted and clarified by the Commission in Order No. 19702 (853), made upon Phillips' application, vague or uncertain.

The latter order interpreted the general order as fixing the price of gas sold in the field at 7 cents per MCF, and as requiring that gas taken from the field but not sold therein be so utilized as to bring the producer the equivalent of not less than 7 cents per M therefor. Those statutes and orders as thus construed and interpreted are not vague

or uncertain (*Patterson* v. *Stanolind Oil & Gas Co.*, 182 Okla. 155, 305 U. S. 376, 379; *Mutual Film Corp.* v. *Industrial Commission*, 236 U. S. 230; *Gundling* v. *Chicago*, 177 U. S. 183; *Red "C" Oil Mfg. Co.* v. *North Carolina*, 222 U. S. 380; *Mahler* v. *Eby*, 264 U. S. 32; *Federal Radio Commission* v. *Nelson Bros. Bond & Mtg. Co.*, 289 U. S. 266; *Bowles* v. *Willingham*, 321 U. S. 503; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8).

Furthermore, the orders were not retroactive. They did not affect past transaction. They were made on December 9, 1946, and were not to become effective until January 1, 1947.

(b) The assignment that the findings purporting to support the order are contrary to the evidence in that no waste of gas was being committed, that correlative rights of owners and producers were being protected and conservation was being observed, and that the orders were therefore arbitrary, discriminatory and irrelevant to any policy the state was free to adopt, is not correct.

The findings were sufficient to support the order, and they were based upon competent evidence.

If there was no physical waste of gas in the field, it was because the producers who had no outlet did not blow their gas into the air but kept their wells closed while appellant drained away and appropriated their gas.

The statement that correlative rights of owners were being protected is simply not true. Appellant's refusal to take their gas, except under contracts for the life of the

leases and at a non-competitive price fixed by it, with the alternative of suffering the drainage of their leases, did not constitute the protection of their correlative rights, and therefore the order was not arbitrary, and was not irrelevant to the State's policy of protecting the correlative rights of owners and lessees.

As JUSTICE RUTLEDGE said in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 89, appellant's contention is "that it has a Federal Constitutional right to drain off all the gas in the field, unless other owners of producing rights can supply their own facilities for marketing their production, regardless of varying conditions in different competitive situations and regardless of all consequent practical considerations affecting feasibility of furnishing such facilities"; and again that it "in effect is saying that the State cannot restrict its right to take all gas in the common reservoir, including all that can be drained from beneath Peerless' lease and the lands of other owners similarly situated" (p. 91). And he said that appellant "has no such right."

All that appellant can mean by its statement that there was no waste of gas and that conservation was being observed is merely that gas was not being blown into the air. In the face of the undisputed evidence it cannot mean that it was not draining Peerless' gas and appropriating it without compensation, which was a violation of Peerless' correlative right.

(c) The fact that the orders are applicable only in the Hugoton field does not constitute a denial of equal protection.

Conditions differ in the different fields. In many of them, there is no necessity or occasion for such an order; and it is competent for the Commission to deal with each field according to the conditions prevailing in it. Classification based upon differences in conditions is not violative of the equal protection clause. In the two cases of *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573 and 311 U. S. 570, the orders of the Texas Commission applied only to the East Texas field, and in *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, the order was applicable only in the Oklahoma City field. That was because those were the only fields in which the conditions required such orders at that time. And those orders were upheld by this Court.

The statute (Appendix C, Sec. 239) authorized the Commission "to regulate the taking of natural gas from *any* or all such common sources of supply within the State." That did not require that every order be applicable to every field, regardless of circumstances and conditions. The depths at which gas is found in the different fields in Oklahoma vary from 500 to 12,000 feet. The volumes and pressures vary as do the size and economic value of the pools themselves. Competitive conditions exist in some and not in others. The Commission deals with those questions from time to time, and is familiar with the regulatory problems of the common sources of supply in the State.

Peculiarly appropriate, therefore, is JUSTICE RUTLEDGE's statement in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 98, as follows:

> "For we have constantly recognized the propriety of allowing wide discretion to the administrative agencies who are best qualified to select the most reasonable solutions to the thorny problems that accompany regulation in this highly technical field. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573."

The order is presumed to be valid. "Every possible presumption is in favor of its validity" (*Nebbia* v. *New York*, 291 U. S. 502, 537). The burden, therefore, is upon defendant to show that it is not. That means that, as relates to a denial of equal protection because the order is applicable in only one field, the burden is upon appellant to show that the conditions in other fields are so like those in the Hugoton field as to require the same order, and appellant has not attempted to do so. The record contains no evidence as to conditions in other fields in comparison with those prevailing in the Hugoton field.

(d) The statutes and orders do not take appellant's property without compensation, and do not give it to appellee without any justifying public purpose or due reciprocity of advantage.

Far from taking appellant's property without compensation, the purpose and effect of the statutes and orders are to prevent appellant from taking appellee's property without just compensation. And the public purpose and

reciprocity of advantage of the statute and orders are evident.

We think we have sufficiently answered that contention in our discussion of the constitutionality of the statutes and orders under the heading "In General."

(e) The statutes are not ambiguous, and the judgment of the Supreme Court upholding the orders is not arbitrary.

We have already shown that neither the statutes nor the orders are ambiguous, and if they were, that would render them, not void, but only subject to construction by the State Supreme Court.

And that Court's adjudication that appellant is a common purchaser, and that the 1915 Act (Appendix C, Sec. 240) authorizing the Commission to make regulations for the "equitable purchasing of gas" empowered it to fix the price, is not unreasonable or arbitrary. There can be no purchase without a price, and an order requiring one to purchase without fixing the price is nugatory if the purchaser and seller cannot agree upon a price.

(f) The statute is not void for failure to provide a standard of policy to guide the Commission in fixing the price. It grants the Commission no arbitrary power in that respect.

There is implicit in the statute the requirement that the price fixed shall be reasonable. For example, construed literally, the Sherman Act prohibits all restraints of trade; but this Court held that it was to be interpreted in the light of reason, and that it prohibited only unreasonable or undue restraint (*The Standard Oil Co.* v. *United States*,

221 U. S. 1). In short, the Court found in the act the legislative intent that the restraint prohibited should be the converse of reasonable. In this case the statute uses the word "equitable", which means fair and reasonable, and, to insure the fairness and reasonableness of the price fixed, it grants an appeal to the State Supreme Court. The constitutions of Virginia and Oklahoma, in granting their commissions power to regulate rates, provide only that the rates fixed shall be "reasonable and just" (Okla. Const., Art. IX, Sec. 18). The regulatory provisions of those constitutions have come under the scrutiny of this Court (*Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Oklahoma Natural Gas Co.* v. *Russell et al.*, 261 U. S. 290), but neither it nor any other court has ever held that the standard prescribed was not sufficient or that the power conferred was arbitrary.

In *Mutual Film Corporation* v. *Industrial Commission*, 236 U. S. 230, the statute created a Board of Censors and empowered it to prohibit the showing of any films except those "of a moral, educational or amusing or harmless character", and this Court sustained it as against the contention that it furnished no standard by which to determine what constituted moral, educational, or amusing or harmless character, and therefore left the matter to the arbitrary judgment or caprice of the Commission.

In *Mahler* v. *Eby*, 264 U. S. 32, this Court, passing upon a statute authorizing the deportation of "undesirable aliens", held that those words were "sufficiently definite to make the delegation quite within the power of Congress."

In *Federal Radio Commission* v. *Nelson Bros. Bond &*

Mtg. Co., 269 U. S. 266, the Court sustained the Act of Congress providing that licenses should be granted "as public convenience, interests or necessity requires" as against a contention that it set up a standard so indefinite as to confer an unlimited power.

In *Bowles* v. *Willingham*, 321 U. S. 503, this Court held that the rent control provision of the Price Control Act provided a sufficient standard for its administration. It held that it was not unconstitutional because the act provided merely that the rents fixed should be "generally fair and equitable", and that the fact that there was a zone for the exercise of the board's discretion did not invalidate the act.

In *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, the statute prohibited the "unreasonable" waste of gas, and this Court held that sufficiently prescribed the standard.

(g) The price and basis of measurement fixed by the orders do not apply retroactively.

The orders were not retroactive. Made on December 9, 1946, they did not become effective until January 1, 1947. The orders themselves, therefore, affected appellant only from and after the latter date.

It may be that appellant will be required to pay Peerless for the gas taken from the latter from and after July 9, 1946, at the price fixed by the orders; but, if so, that will result, not from the orders' compulsion, but from the written stipulation entered into between appellant and Peerless on that date, providing that appellant would connect with Peerless' wells without prejudice to the final

determination of the proceeding, and would pay for the gas taken whatever price should be finally and validly fixed (211). If, therefore, appellant is required to pay for that gas the price fixed in the orders, it will be only because it contracted to do so.

(h) The proceeding resulting in the orders was legislative and not judicial in character.

In its Assignments II(c) and III(c) appellant refers to the proceeding as judicial in character and claims invalidity on that account. Also, before answering, it filed a motion stating that the proceeding to fix price and measurement was judicial in character, to which the Commission's general rules of procedure were not applicable; that no statute prescribed the procedure in such cases, and that it was in doubt what rules would be applied; and it moved that the Commission, in advance of the hearing, advise it what rules of practice and procedure would be applied (44).

Upon presentation of the motion, the Commission stated that it would answer the question raised if and when it became necessary in the trial (64); and, in addition to the assignments above, appellant assigns that due process was denied it by consolidating judicial and legislative proceedings, and refusing to inform it in advance of the rules of procedure to be applied in the former.

Even if the proceeding were both legislative and judicial in character, there is nothing in the Constitution of the United States that would prevent their consolidation for hearing.

But the proceeding before the Commission was wholly legislative and in no respect judicial in character. It sought the fixing of the price and measurement of gas in the Hugoton field, and measurement is an element of price. The fixing of a price at which a commodity shall be purchased or sold is a legislative and not a judicial act. It could have been done by direct act of the Legislature, and, if so done, no one would say that it was judicial in character. The orders are laws and not judgments. The Oklahoma Supreme Court held the proceeding legislative. It said:

> "The orders are legislative in character and subject in a large measure to the rules and principles by which the validity of statutes are determined. In the hearings preceding the orders, and not for violations thereof, the rules and principles of procedure obtaining in the enactment of a statute more nearly apply than the strict rules applicable to law courts."

And in *Grand Trunk Western Ry. Co.* v. *Railroad Commission*, 221 U. S. 400, this Court said that an order of the Indiana Commission is a legislative act by an instrumentality of the state exercising delegated authority, is of the same force as if made by the legislature, and so is a law of the state. See also to the same effect *Louisville & N. Ry. Co.* v. *Garrett et al.*, 231 U. S. 298, 305; *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 555; *Lake Erie and Western R. R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, 424; *King Mfg. Co.* v. *City of Augusta*, 277 U. S. 100, 112.

The orders adjudged no liability on past facts. They looked only to the future, and prescribed a rule of action to be observed thereafter.

While the Commission acts judicially in enforcing its orders, the orders themselves are legislative in character. In making them it sits as a legislative or administrative body. It is only in proceedings to enforce them that it acts judicially.

In *Prentis* v. *Atlantic Coast Line Ry. Co.*, 211 U. S. 210, this Court, speaking through JUSTICE HOLMES, defined and distinguished judicial and legislative proceedings in the following language, which has been quoted and applied by courts innumerable:

> "But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by sec. 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind, as seems to be fully recognized by the Supreme Court of Appeals, *Commonwealth* v. *Atlantic Coast Line Ry. Co.*, 106 Virginia 61, 64, and especially by its learned President in his pointed remarks in *Winchester and Strasburg R. R. Co. and others* v. *Commonwealth*, 106 Virginia, 264, 281. See further *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 440."

"Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. sec. 720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co.* v. *Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94, affirmed sub. nom. *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S. 339, 348. They are not a suit in which a writ of error would lie under Rev. Stats. Sec. 709, and Act of February 18, 1875, ch. 80, 18 Stat. 318. See *Upsher County* v. *Rich*, 135 U. S. 467; *Wallace* v. *Adams*, 204 U. S. 415, 423. The decision upon them cannot be *res judicata* when a suit is brought. See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up."

The order in that case had fixed railway rates for carrying passengers. Where the state has power to fix the price at which an article shall be bought or sold, its action in doing so is not different in character from that of fixing a rate. Railroad rates are the prices for transportation; and, if fixing them is a legislative act, then the fixing of a price for a commodity is also a legislative act. Such an act does not "enforce liabilities as they stand on present or past facts", but it "looks to the future, and changes existing conditions by making a new rule to be applied thereafter." "The establishment of a rate (price) is the making of a

rule for the future, and therefore is an act legislative, not judicial, in kind."

There was, therefore, no mingling of judicial and legislative proceedings in this case. There was no judicial proceeding; and the Commission had adopted, promulgated and printed its rules of practice and procedure in legislative proceedings.

The action of the State Supreme Court, however, refusing to annul or vacate the order, was judicial in character (Okla. Const., Art. IX, Sec. 20). The appeal was the equivalent of and a substitute for an independent suit to test the validity of the orders (*Federal Radio Commission* v. *Nelson Bros. Bond & Mtg. Co.*, 289 U. S. 266).

But, even if the proceeding before the Commission had been judicial, Sec. 18, Art. IX, Okla. Const., and Title 17, Okla. Stat. 1941, and numerous decisions of the Supreme Court of the State had defined the rules of procedure. Thus, in *St. Louis & S. F. Ry. Co.* v. *C. H. Cannon & Son*, 31 Okla. 476, the Court held that when the Commission sits as a court its proceedings are governed by the same rules that obtain in courts of justice. The constitution, statutes and decisions require notice, give the right to appear and defend, to have compulsory process for witnesses, to examine and cross-examine witnesses, and to be heard by counsel orally and by brief; and they require that the Commission's orders be consonant with the Constitutions of the United States and the State and with the State's laws. Such a proceeding affords due process.

Furthermore, nothing in the proceeding is pointed out as constituting a practice unknown to or which could not

have been anticipated by Cities. So far as the record shows, the matter complained of is a mere formality, wholly without effect upon the trial.

(i) The statutes and orders do not require appellant to discriminate as to price and measurement in favor of Peerless and against other sellers in the field, in that the orders are leveled solely at appellant and require it to pay a higher price than is being paid by it under existing contracts with other sellers, as alleged.

Far from requiring appellant to discriminate as between producers in the field, the effect of the orders and one of their purposes are to prevent such discrimination. Appellant was already discriminating as between producers, both in its taking of gas and in the prices it paid. It took the gas from some and refused to take it from others, and it paid a different price to the various sellers.

The general order, No. 19514, is intended to end that. It requires purchasers to pay the same price upon the same basis of measurement, and thus not only prevents appellant and other purchasers from discriminating as between sellers, but it makes the same requirement of all purchasers, and thus prevents discrimination as against appellant.

(j) Under the circumstances the state has power to fix a minimum price for gas in the Hugoton Field, and the fact that appellant has contracts for the purchase of gas at prices different from that fixed does not prevent the exercise of that power.

It will be observed that appellant does not invoke the contract clause of the Constitution. Its Assignment II(d) with reference to its contracts is only that the statutes and orders discriminate against it in that they require it to pay a price for gas higher than it is currently paying under existing contracts, and therefore take its property without compensation and give it to sellers without any justifying public purpose or reciprocity of advantage. That assignment invokes only the due process and equal protection clauses.

Under its police power, for the purpose of conserving the gas supply, protecting the correlative rights of producers, and for the general welfare, and under the circumstances existing here the State has power to fix the price of gas in the field. Of course, it cannot fix prices aimlessly or arbitrarily. But, where the commodity is an important natural resource of the State, and the manner of its taking and the prices paid for it are matters of public concern affecting large bodies of its citizens, is inextricably linked with conservation and the protection of correlative rights, and the taker is a common purchaser, under the decisions of this Court there can be no question of the State's power to fix the price.

In *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 89, this Court sustained a statute fixing insurance rates,

and held that the business by circumstances and its nature had risen from private to public concern and had consequently become subject to governmental regulation. To the same effect is *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71.

Nebbia v. *New York*, 291 U. S. 502, sustained a statute and order fixing the price of milk. Therein this Court said:

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

Further on it said:

> "The court has repeatedly sustained curtailment of enjoyment of private property in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."

Again it said:

> "The constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business or to pursue a calling may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency."

It said that the dairy industry was not, in the accepted sense of the phrase, a public utility; but that the conditions

under which milk was sold at wholesale and retail affected the community at large and were of public consequence, and that the business was therefore subject to regulation; that the private character of a business does not necessarily remove it from the regulation of charges or prices. It said that "There is no closed class or category of business affected with a public interest", and that the function of the courts is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exercise of governmental authority or condemn it as arbitrary or discriminatory.

In *Mayo, Commissioner* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, this Court said:

> "The mere fact that the act fixes prices is, in itself, insufficient to invalidate it; and allegation of that fact does not raise substantial federal questions. The presumption that an act fixing prices is constitutional would require the denial of a temporary injunction except in extraordinary situations. Findings to support a conclusion against constitutionality would need to be unequivocal."

In *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, this Court sustained a statute of Pennsylvania which required dealers in milk to obtain licenses, to give security for payment of purchases from producers, and to pay the producers not less than a minimum price prescribed by an administrative agency; and it sustained that statute as applied to a dealer who purchased milk from neighboring farms which he shipped to another state for sale. The Court held that the purpose of the statute was to reach a domestic situation in the interests of the welfare of the producers and consumers of milk in Pennsylvania.

Again in *United States* v. *Rock Royal Co-op, Inc.,* 307 U. S. 533, this Court sustained an order of the Secretary of Agriculture made under the Agricultural Marketing Agreement Act of 1937, fixing and equalizing minimum prices to be paid producers for milk sold to dealers in interstate or foreign commerce.

And in *Parker, Director of Agriculture* v. *Brown,* 317 U. S. 341, this Court sustained a statute of California and and administratve order made under it fixing the price of raisins for the purpose of "conserving the agricultural wealth of the state" and "preventing economic waste in the marketing of agricultural products."

In *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 394, this Court said:

> "Nor does the Act violate the Fifth Amendment. Price control is one of the means available to the states *(Nebbia* v. *New York,* 291 U. S. 502) and to the Congress *(United States* v. *Rock Royal Co-op, Inc., supra)* in their respective domains *(Baldwin* v. *G. A. F. Selig, Inc.,* 294 U. S. 511) for the protection and promotion of the welfare of the economy."

There are other decisions to the same effect, but the foregoing are sufficient. They sustain the proposition that, if the fixing of a price is a reasonable means of effectuating a policy which the state has power to adopt, then it has the right to fix it, and that the wisdom of the policy rests with the legislature and is not subject to review by the courts.

Oklahoma's policy is shown, not only by the statutes

set forth in the appendices, but also by Okla. Stat. 1941, Title 79, Sec. 4, which was enacted in 1910 and is as follows:

> "Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such manner as to make it of public consequence or to affect the community at large as to supply, demand, or price or rate thereof, or said business is conducted in violation of the first section of this Article, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm, or corporation engaged in any public business to render its services and offer its commodities or either upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

The power to require ratable taking implies and includes the power to fix the price, otherwise the requirement is satisfied if the taker takes the gas without paying any compensation for it. Or he can offer a mere pittance for it, and say that he is not taking it because its owner refuses to let him have it for the pittance.

Of course, there are limitations as to the price to be fixed. It may be fixed so high or so low as to constitute a deprivation of property without due process, and thus offend the 14th Amendment. But it is not assigned that

the price fixed is so high as to constitute a deprivation of property; it is only contended that the Commission cannot fix a price at all.

Moreover, the existing price in the field cannot be the criterion when that price is a non-competitive one fixed by the taker himself, any more than the rate base of a public utility can be fixed upon the basis of earnings produced by unregulated and excessive rates (*Los Angeles Gas Co.* v. *Railroad Commission*, 289 U. S. 287, 305).

(k) Appellant's contracts do not render it immune from regulation.

If the state otherwise has power to fix a minimum price for the gas, then the fact that appellant has contracts that will be affected does not prevent the exercise of the power. "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter" (*Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 357).

In contracting the parties are charged with knowledge of the law and with the possibility of the state's exercising its power thereunder, and of the fact that when it does so, the contracts must give way. Appellant knew that, and its contracts were expressly made subject to the exercise of that power. They contain provisions to the following effect:

> "All the provisions of this contract are subject to all valid legislation, State or Federal, with respect to the subject matter hereof, and to all valid present and future gas proration and other applicable orders, rules

and regulations of duly constituted authorities having jurisdiction" (795, 802; 713, 732; 695, 711; 618, 635).

See *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109.

In *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, the railway company had contracted to give Mottley a free pass for life in settlement of an action for personal injury. Subsequently Congress forbade the issuance of free passes, whereupon the railway refused to renew Mottley's pass, and he sued to compel it to do so. This Court held that the contract, though valid when made, "must necessarily be regarded as * * * made subject to the possibility that, at some future time, Congress might so assert its whole constitutional power in regulating interstate commerce as to render the agreement unenforcible or to impair its value. That the exercise of the power might be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable." See also *United States* v. *B. & O. R. Co.*, 333 U. S. 169, 175; *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 613-14.

In *Henderson Co.* v. *Thompson*, 300 U. S. 256, this Court held valid a Texas statute forbidding the use of sweet gas for the manufacture of carbon black, and held that the effect of the statute upon contracts of the company for the purchase of sweet gas from producers for carbon black purposes was merely incidental, and did not violate the constitution.

See also *Atlantic Coast Line Ry. Co.* v. *Goldsboro*, 232 U. S. 548, 558; *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372; *Stephenson* v. *Binford*, 287 U. S.

251, 276; *Sproles* v. *Binford*, 286 U. S. 374, 390; *Sutter Butte Canal Co.* v. *Railroad Commission*, 279 U. S. 125, 137-39; *Producers' Transportation Co.* v. *Railroad Commission*, 251 U. S. 228.

(l) The hearing was fair and impartial and did not deny appellant due process of law.

We have already noticed the complaint that the Commission erroneously consolidated judicial and legislative proceedings, and have shown that the only proceeding before it was legislative in character, and that, even if it were not, the consolidation of legislative and judicial matters in the proceeding raises no federal question.

As to the Commission's alleged refusal to inform appellant in advance of the rules and practices of procedure to be followed, those rules had been printed and published, and the appearance of appellant's attorneys in the cause implied that they were familiar with them, as it was their duty to be.

Allowing the Commissioners of the Land Office to file an intervening petition and consolidating it with the proceeding upon Peerless' petition, and allowing the Commission's conservation attorney to participate in the proceeding, were within the Commission's power and discretion. Since the State owned large bodies of land in the Hugoton field which were under the control of the Commissioners of the Land Office, it was proper to permit the latter to intervene and to participate in the proceeding; and since one purpose of the proceeding was the conservation of gas, it was the right and duty of the conservation attorney to participate in it.

It is not true that the Commission allowed a private citizen to make an unsworn statement to it during the proceeding. The reference is to H. W. Long, and the record shows that he was duly sworn (97-98), and was cross-examined at length (107-112). Also, the proceeding was a legislative and not a judicial one.

As to the statement that the Commission wrongfully conducted a plebiscite of land and royalty owners during the proceeding, the facts were these: The Texas County Land & Royalty Owners Association sought to file an intervening petition in the cause, and appellant itself read the petition to the Commission and objected to its filing on the ground that the genuineness of the signatures to it had not been shown. It was then stated that the members of the Association were present, whereupon each was called and was asked only if he had signed the petition, and he answered that he had (111-117). Since they had the right to file an independent proceeding, there was nothing wrong in admitting them to participate in the pending one.

But even if the Commission had conducted a plebiscite, that would not have invalidated its order. That very thing was done by the Secretary of Agriculture in *United States v. Rock Royal Co-op., Inc.*, 307 U. S. 533, before promulgating an order fixing the price of milk, and this Court held that it was authorized by the act and was not unreasonable.

Furthermore, in a legislative proceeding such as this was, the strict rules governing judicial hearings do not apply.

(m) The price fixed is not unreasonable or excessive.

As stated above, appellant has not assigned that it is. Nevertheless, we feel that we should point out briefly the facts affirmatively showing its reasonableness. The following facts were shown without dispute:

Gas in the Hugoton field, in comparison with coal at various mines in Oklahoma, is worth from 14.73 to 27 cents per MCF, and compared with oil it is worth 20 cents per MCF (190-91).

Ever since 1916 the price of gas from all wells in the Osage Nation under the jurisdiction of the Secretary of the Interior has been 18 cents per M at the well, measured at 10-oz. above atmospheric pressure (200), and appellant buys gas therein at that price (202). That is 11 cents per M greater than the 7 cents price fixed by the Commission.

Appellant itself buys gas from Anderson-Prichard Oil Corporation at 7 cents per M (201-02). Hazel-Atlas Co. at Ada pays 11 cents per M for gas (106-07).

Cities has made contracts with Harrington & Marsh, Magnolia Petroleum Company and Stanolind Oil & Gas Company to purchase their gas in the Hugoton field and to pay 6 cents per M therefor (410).

It must be evident, therefore, that a price of 7 cents per MCF is not so excessive as to constitute a deprivation of property. A corporation that pays from 6 to 18 cents per M for gas at the wellhead will hardly be heard to say that 7 cents is an excessive price; and, as stated, appellant has not assigned that it is.

V.

The statutes and orders are not violative of the commerce clause.

As we view the case, there is no question of interstate commerce in it. It is true that a part of appellant's business is the transportation and sale of gas in interstate commerce; but that is only a part of it, and is not the part at which the statutes and orders are aimed. Appellant is also engaged in intrastate business. It owns gas leases in the State, it operates them, it purchases gas in the State, and it sells gas therein. And the statutes and orders are intended to regulate appellant's production from its own wells, to forbid it to drain its neighbors' lands, and to that end to require it to purchase from them ratably at a reasonable price or close its own wells. The statutes and orders are not aimed at interstate commerce and do not discriminate against it. They are applicable to all producers and purchasers regardless of what they do or intend to do with the gas.

All of appellant's actions here sought to be regulated are local in character; and the power of the State to protect its inhabitants in the ownership and enjoyment of their property and to prevent the waste of its natural resources is undoubted, and is not limited by the commerce clause of the constitution.

In *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, the appellant made the same contention but this Court said:

"Such production is essentially a mining operation and therefore is not a part of interstate commerce

even though the product obtained is intended to be and in fact is immediately shipped in such commerce. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178. *Hope Gas Co.* v. *Hall*, 274 U. S. 284, 288. *Foster Packing Co.* v. *Haydel*, 278 U. S. 1, 10. *Utah Power & Light Co.* v. *Pfost, supra.* No violation of the commerce clause is shown."

The commerce clause is not a shield for theft. It affords no protection to a wrongdoer who seeks unlawfully to appropriate another's property with the intent to ship it in interstate commerce; and the owner can replevy it, though it be under an interstate bill of lading or even in transit. Before one can lawfully put in interstate commerce an article under the jurisdiction of the state and claim immunity from state laws with respect to it, he must have lawfully acquired ownership of the property under the state's laws. That is antecedent to interstate commerce. Since the gas underlies lands in the state and is the property of the landowners, the state laws govern the passing of title to it and the relation between the owner and taker of it. And the state has power to prohibit one from appropriating it without just compensation, even though the would-be appropriator intends to ship it in interstate commerce.

In Note 31 to JUSTICE RUTLEDGE's opinion in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 95, he said:

> "Oklahoma can prevent agents of Republic from going on Peerless' land by force of arms and there drilling a well and stealing gas. The state's power to prevent larceny and trespass and to enjoin any use of property that creates a nuisance for a neighboring property owner also justifies the regulation of com-

mon property for the mutual advantage of its several owners. *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Bacon* v. *Walker*, 204 U. S. 311."

And it is significant that Okla. Stat., Title 52, Sec. 235, being a part of the 1913 Act set forth in Appendix A but not copied therein, provides:

> "Any person or agent of a corporation, who takes gas, or aids or abets in the taking of gas, except as herein provided, * * * shall be guilty of grand larceny."

Appellant contends that the statutes and orders conflict with the Natural Gas Act of 1938 (52 Stat. 821), and therefore must fall. But that is not true. If that Act is applicable to the matters here involved, then it invades in that respect the reserved powers of the state, and thereby violates the 10th Amendment. But there is no conflict.

The intention of Congress, in regulating interstate commerce, to exclude the states from asserting their police power must be clearly manifested (*Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611, and cases there cited; *Kelly* v. *Washington*, 302 U. S. 1, 10; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85; *Maurer* v. *Hamilton*, 309 U. S. 598, 614; *Watson* v. *Buck*, 313 U. S. 387).

Not only does the Natural Gas Act not manifest such intention, but the act itself and the committee reports show their intent and scrupulous care to preserve in the states

all the rights and powers they previously had. Thus, Section I(b) of the act provides:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

And in the House Committee Report it was stated that the purpose of the act was "to occupy this field in which the Supreme Court has held that the states may not act", and that "*The bill takes no authority from state commissions, and is so drawn as to complement and in no manner usurp state regulatory authority* * * *."

In *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 501, 612, this Court said:

> "As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions, and the Federal Power Commission was given no authority over 'the production or gathering of natural gas'. In addition Congress recognized the legitimate interests of the states in the conservation of natural gas."

Further on it said (p. 614):

> "It is hardly necessary to add that a limitation on the net earnings of a natural gas company from its interstate business is not a limitation on the power of the producing state *either to safeguard its tax reve-*

nues from that industry or to protect the interests of those who sell their gas to the interstate operator. The return which the Commission allowed was the net return after all such charges."

And, in *Interstate Gas Company* v. *Federal Power Commission*, 331 U. S. 682, this Court said:

"Clearly, among the powers thus reserved to the states is the power *to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern.* It was the intention of Congress to give the states full freedom in these matters. *Thus, where sales, though technically cosummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the state of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach.*"

In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 517, this Court said that the Natural Gas Act, though extending federal regulation, "had no purpose or effect to cut down state power" and that "the act was drawn with meticulous regard for the continued exercise of state power, *not to handicap or dilute it in any way.*"

Further on (p. 519) this Court said: "Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach"; and on page 520 it said that the Natural Gas Act "created an articulate legislative program based on a clear

recognition of the respective responsibilities of the federal and state regulatory agencies", without in any manner usurping the latter's authority.

In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, this Court held that under the Natural Gas Act the sale and transfer of gas leases by an interstate pipe line company was subject to state regulation and control and outside the scope of the Federal Power Commission's regulatory powers, notwithstanding the facts that gas from those leases was being transported in the interstate pipe line and that the leases themselves were listed to justify the issuance of a certificate of convenience and necessity.

It follows, therefore, that the provisions of the Natural Gas Act and the authority of the Federal Power Commission do not impinge upon the power of the state and its regulatory agencies, but take up where the latters' powers end.

In *Parker, Director of Agriculture* v. *Brown*, 317 U. S. 341, the Director of Agriculture, acting under the California Agricultural Prorate Act having the expressed purpose of "*conserving the agricultural wealth of the state*" and "*preventing economic waste in the marketing of agricultural products*" therein, had fixed the price of raisins which, after purchase, were to be shipped in interstate commerce; and this Court sustained the act and the order. Once more we quote at length. In the opinion (pp. 359-61) it said:

> "The governments of the states are sovereign within their territory save only as they are subject to

the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers. This court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. *Minnesota Rate* Cases, 230 U. S. 352, 399-400; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 187, *et seq.; California* v. *Thompson,* 313 U. S. 109, 113-14 and cases cited; *Duckworth* v. *Arkansas,* 314 U. S. 390. *A fortiori* there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it. Whether we resort to the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold and shipped out of it—or whether we consider only the power of the state in the absence of Congressional action to regulate matters of local concern, even though the regulation affects or in some measure restricts the commerce—we think the present regulation is within state power.

"In applying the mechanical test to determine when interstate commerce begins and ends (see *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 21 and cases cited; *Minnesota* v. *Blasius,* 290 U. S. 1 and cases cited) this Court has frequently held that for purposes of local taxation or regulation 'manufacture' is not interstate commerce even though the manufac-

turing process is of slight extent. *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 129; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; *Hope Gas Co.* v. *Hall*, 274 U. S. 284; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210; *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422. And such regulations of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. *Kidd* v. *Pearson*, 128 U. S. 1; *Champlin Refining Co.* v. *Commission*, *supra; Sligh* v. *Kirkwood*, 237 U. S. 52; see *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 245; *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 77; cf. *Bayside Fish Co.* v. *Gentry*, *supra*. A state is also free to license and tax intrastate buying where the purchaser expects in the usual course of business to resell in interstate commerce. *Chassaniol* v. *Greenwood*, 291 U. S. 584. And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.

"All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs. Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce."

Peerless and other local producers whose interests are intended to be protected are not engaged in interstate commerce; and applicable to such situation this Court, in *Parker* v. *Brown*, *supra*, said (pp. 362-363):

> "This distinction between local regulation of those who are not engaged in commerce, although the commodity which they produce and sell to local buyers is ultimately destined for interstate commerce, and the regulation of those who engage in the commerce by selling the product interstate, has in general served, and serves here, as a ready means of distinguishing those local activities which, under the Commerce Clause, are the appropriate subject of state regulation despite their effect on interstate commerce. But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. See *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44 (with which compare *California* v. *Thompson*, *supra*); *South Carolina Highway Dept.* v. *Barnwell Bros.*, *supra*; *Milk Control Board* v. *Eisenberg Co.*, 306 U. S. 346; *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 504-5.
>
> "Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' see *Di Santo* v. *Pennsylvania*, *supra*; cf. *Wickard* v. *Filburn*, *supra*, not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears

that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. See *Minnesota Rate Cases, supra,* 398-412; *California* v. *Thompson, supra,* 113."

Further on this Court said:

"This history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsist Congressional action, is a problem whose solution is peculiarly within the province of the state. In the exercise of its power the state has adopted a measure appropriate to the end sought. The program was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent. The effect on the commerce is not greater, and in some instances was far less, than that which this Court has held not to afford a basis for denying to the states the right to pursue a legitimate state end. Cf. *Kidd* v. *Pearson, supra; Sligh* v. *Kirkwood, supra; Champlin Refining Co.* v. *Commission, supra; South Carolina Highway Dept.* v. *Barnwell Bros., supra,* and cases cited at p. 189 and notes 4 and 5; *California* v. *Thompson, supra,* 113-15, and cases cited."

In *Republic Natural Gas Company* v. *Oklahoma*, 334 U. S. 62, Republic was engaged in producing gas in Oklahoma and transporting the same into Kansas and there selling it; and it is significant that no member of the Court expressed the thought that the order was void on that account.

We think it can be shown that, if the statute and order have any effect upon interstate commerce, such effect is only incidental and indirect and does not render the order void. Also, many other authorities can be cited, but we think the foregoing sufficient.

Respectfully submitted,

DAVID A. RICHARDSON,
Attorney for Peerless Oil and
Gas Company;
MAC Q. WILLIAMSON,
Attorney General of Oklahoma;
FRED HANSEN,
Assistant Attorney General of Oklahoma;
FLOYD GREEN,
Attorney for the Corporation Commission;
THOMAS J. LEE and
RICHARD H. DUNN,
Attorneys for Commissioners of the
Land Office;
and
T. MURRAY ROBINSON,

Attorneys for the State of Oklahoma.

Of Counsel:
RICHARDSON, SHARTEL & COCHRAN.

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APPENDIX

APPENDIX A

Act of 1913,
Oklahoma Statutes 1941,
Title 52, Sections 231-233

231—"All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners or gas lessees of the surface under which gas is located in its original state."

232—"Any owner, or oil and gas lessee, of the surface, having the right to drill for gas shall have the right to sink a well to the natural gas underneath the same and to take gas therefrom until the gas under such surface is exhausted. In case other parties, having the right to drill into the common reservoir of gas, drill a well or wells into the same, then the amount of gas each owner may take therefrom shall be proportionate to the natural flow of his well or wells to the natural flow of the well or wells of such other owners of the same common source of supply of gas, such natural flow to be determined by any standard measurement at the beginning of each calendar month; provided, that not more than twenty-five per cent of the natural flow of any well shall be taken, unless for good cause shown, and upon notice and hearing the Corporation Commission may, by proper order, permit the taking of a greater amount. The drilling of a gas well or wells by any owner or lessee of the surface shall be regarded as reducing to possession his share of such gas as is shown by his well."

233—"Any person, firm or corporation, taking gas from a gas field, except for purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said own-

ers and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas."

APPENDIX B

Act of 1913,
Oklahoma Statutes 1941, Title 52,
Sections 23, 24 and 25.

23—"Every corporation, joint stock company, limited copartnership, partnership or other person, now or hereafter claiming or exercising the right to carry or transport natural gas by pipe line or pipe lines, for hire, compensation, or otherwise, within the limits of this state, is allowed by, and upon compliance with the requirements of this act, as owner, lessee, licensee, or by virtue of any other right or claim, which is now engaged or hereafter shall engage in the business of purchasing natural gas shall be a common purchaser thereof, and shall purchase all the natural gas in the vicinity of, or which may be reasonably reached by its pipe lines, or gathering branches, without discrimination in favor of one producer or one person as against another, and shall fully perform all the duties of a common purchaser; but if it shall be unable to perform the same, or be legally excused from purchasing and transporting all the natural gas produced or offered, then it shall purchase and transport natural gas from each person or producer ratably, in proportion to the average production, and such common purchasers are hereby expressly prohibited from discriminating in price or amount for like grades of natural gas or facilities as between producers or persons; and in the event it is likewise a producer, it is hereby prohibited from discrimination in favor of its own

production, or production in which it may be interested directly or indirectly in whole or in part, and its own production shall be treated as that of any other person or producer. All persons, firms, associations, and corporations are exempted from the provisions of this act, except from the provisions of section (9) hereof, where the nature and extent of their business is such that the public needs no use in the same, and the conduct of the same is not a matter of public consequence, and for this purpose the district courts of the state and the Corporation Commission are hereby vested with jurisdiction to determine such exemptions in any action or proceeding properly before them, and provided by the laws now in force in this state regulating the purchase and transportation of oil."

24—"Every corporation, joint stock company, limited co-partnership, partnership or other person, now or hereafter engaged in the business of carrying or transporting natural gas for hire, for compensation or otherwise, by pipe line, or pipe lines within this State, and by virtue of and in conformity to, any valid law incapable of revocation by any law of this sate or of the United States, or by virtue of and in conformity of the provisions of this Act, shall be a common carrier thereof as at common law, and no such common carriers shall allow or be guilty of any unjust or any unlawful discrimination, directly or indirectly, in favor of the carriage, transportation or delivery of any natural gas, offered to it, in its possession or control, or in which it may be interested, directly or indirectly, and, provided further, that any person, firm or corporation owning or operating a gas pipe line within the limits of any incorporated city or town in this state shall be exempted from the provisions of this section only as to its distributing lines located wholly within the corporate limits of said city or town."

25—"It shall be unlawful for any corporation, joint stock company, limited copartnership, partnership or other

person, now or hereafter engaged in the business of carrying or transporting natural gas for hire or compensation or otherwise, within the limits of this act and not becoming a common purchaser as defined by, and accepting the provisions of this act, to own or operate, directly or indirectly, any gas well or wells, gas leases, or gas holdings or interests in this state, after six months next after the approval of this act, and each and every of said corporations, joint stock company, limited copartnership, partnership or other persons shall divest themselves of all legal or equitable ownership, interest or control, directly or indirectly, in gas well or wells, gas leases or gas holdings or interest in this state."

APPENDIX C

Act of 1915,
Oklahoma Statutes 1941, Title 52,
Sections 239 and 240.

239—"Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow

of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another."

240—"Every person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this state, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale, and which may reasonably be reached by its trunk lines, or gathering lines without discrimination in favor of one producer as against another, or in favor of any one source of supply as against another, save as authorized by the Corporation Commission after due notice and hearing; but if any such person, firm or corporation, shall be unable to purchase all the gas so offered, then it shall purchase natural gas from each producer ratably. It shall be unlawful for any such common purchaser to discriminate between like grades and pressures of natural gas, or in favor of its own production, or of production in which it may be directly or indirectly interested, either in whole or in part, but for the purpose of prorating the natural gas to be marketed, such production shall be treated in like manner as that of any other producer or person, and shall be taken only in the ratable proportion that such production bears to the total production available for marketing. The Corporation Commission shall have authority to make regulations for the delivery, metering and equitable purchasing and taking of all such gas and shall have authority to relieve any such common purchaser, after due notice and hearing, from the duty of purchasing gas of an inferior quality or grade."